Statement by the

NATIONAL CATTLEMEN'S BEEF ASSOCIATION

&

PUBLIC LANDS COUNCIL

On

Livestock Grazing on Public Lands

Submitted to the

Subcommittee on Forests and Forest Health

The Honorable Greg Walden, Chairman

Of the

House Committee on Resources

The Honorable Richard Pombo, Chairman

By

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My name is Jim Chilton and I am a 5th generation Arizona rancher. My address is Box 423, 17500 W. Chilton Ranch Road, Arivaca, Arizona 85601. Arivaca is approximately 55 miles southwest of Tucson, Arizona. Our 50,000-acre ranch is adjacent to the town of Arivaca and continues south to the international border with Mexico. The ranch includes private property, state school trust lands and two federal grazing permits within the Coronado National Forest. I am very proud of my wife Sue Chilton, my two sons, my partners (my Father and brother) and ancestors. The entire family is blessed to be able to live preserving our western ranching customs, culture and heritage dating back to pioneering ancestors who entered Arizona Territory in the late 1800's. We have been in the cattle business in Arizona for about 120 years and have a long-term view of the necessity to be excellent stewards of the grasslands we respectfully manage.

The Endangered Species Act: A Hijacked Law

The Endangered Species Act, with its easily-abused present structure, has been hijacked by individual activists and several activist nonprofit corporations. Dr. Alexander J. Thal, Ph.D., Western New Mexico University, in a well documented paper, found that one such organization, the Center for Biological Diversity, has had grave direct and indirect impacts on rural communities in Arizona and New Mexico. Dr. Thal found the Center for Biological Diversity alone has directly and indirectly caused:

1. A loss of over 3,000 jobs in 13 rural communities that lost their major employer displacing thousands of families;
2. A loss of $60,000,000 annual gross receipts from cattle production in Arizona, alone, forcing many small family ranches into financial insolvency; and,
3. Devastation of community social bonds, destabilized families with increased emotional turmoil and resulting mental health issues, severely reduced public services and public works, lost educational programs in local schools, displaced ethnic minorities, and out-migration of youth when productive well-paid employment was eliminated.

The Act has failed to achieve recovery of species. It has only piled up listings that become tools for achieving purposes unintended by Congress. Its present structure rarely helps species and has consistently been co-opted to damage the people and economy of rural America. We have over a thousand listed species. To show for it, we have huge forest fires, devastated timber communities, sold-for-development signs on ranches, fragmented wildlife habitat, and a genuinely endangered species: the western ranching culture. Five major issues cry out for redress by Congress.

1. THE ESA MUST BE AMENDED TO ELIMINATE CONFLICTING AGENCY INTERESTS BY PROVIDING FOR MEANINGFUL APPEAL OF AGENCY LISTING AND RECOVERY ACTION DECISIONS (see page 11 of the attachment)

2. THE USE OF SPECULATION MUST BE SPECIFICALLY ELIMINATED FROM ESA LISTING DECISIONS AND RECOVERY ACTIONS (see page 12 of the attachment)

3. FEDERAL AGENCY EMPLOYEES MUST BE PROHIBITED FROM IMPLEMENTING PERSONAL ACTIVIST AGENDAS UNDER THE COLOR OF ESA AUTHORITY (see page 15 of the attachment)

4. 90-DAY PETITION FINDINGS MUST BE BASED ON SUBSTANTIAL EVIDENCE DERIVED SOLELY FROM THE BEST SCIENTIFIC AND COMMERCIAL INFORMATION AVAILABALE AND MUST NOT BE BASED ON ACCEPTANCE OF THE PETITIONER'S CLAIMS, SOURCES AND CHARACTERIZATIONS TAKEN AT FACE VALUE (see page 17 of the attachment)

5. GEOGRAPHIC RARITY ALONE MUST BE PROHIBITED FROM SERVING AS A SUFFICIENT BASIS FOR AFFIRMATIVE 90-DAY PETITION FINDINGS OR AS JUSTIFICATION FOR A SPECIES' LISTING UNDER THE ESA (see page 21 of the attachment)

The Act Creates Disincentives to Recovery of Species rather than Motivations for Constructive Cooperation

Unfortunately, my family and I have been among the targets of anti-grazing activists like the Center for Biological Diversity since 1997. Groups like the Center have relentlessly employed the Endangered Species Act to achieve their goals, not Congressional goals. We are not alone. The entire unique western cattle ranching culture memorialized in song, poetry, film, literature, art and history has suffered severe damage. This damage is directly attributable to the abuse of the Endangered Species Act by zealots determined to wipe out private property, our economy and our culture. The following chronology clearly demonstrates how, in our case, the Endangered Species Act has been used by the Center for Biological Diversity and other radical organizations to promote their anti-grazing agenda, collect money from the taxpayers and increase donations. The listing racket diverted $992,000 from American taxpayers to just the Center for Biological Diversity in 2003 alone, guaranteeing them money from virtually every lawsuit, win, lose or settle. Their total number of lawsuits filed is approaching 200 including dozens filed during the current year.

Major Assaults on the Chiltons were in 1997 and 1999

The first lawsuit filed by the Center for Biological Diversity and the New Mexico based Forest Guardians in 1997 was designed to enjoin cattle grazing on one of our federal grazing allotments (21,500 acres). In 1999 another suit was filed to enjoin grazing on our other federal grazing allotment (15,000 acres). In both cases the Center alleged the U.S. Forest Service had not consulted with the U.S. Fish and Wildlife Service

regarding federally listed species. The species they named were not known to exist on either of our grazing allotments. The Center followed its established pattern of suing the federal agencies, not the rancher, but actually targeting the ranchers and their essential grazing leases. While we had no responsibility whatsoever for the implementation of the consultation process, we would be the immediate victims of the Forest Service's alleged failure to consult with the U.S. Fish and Wildlife Service. The Center sought an injunction against grazing knowing it would endanger my family's ranching survival. I wondered, with rage, why can we be wiped out financially when we have no control over what the Forest service allegedly did or did not do? Why would Congress enact a law making individual citizens pay the price for agency non-performance?

The Forest Service settled the 1997 lawsuit behind closed doors without our knowledge or agreement or the agreement of the Arizona or New Mexico Cattle Growers associations who were interveners in the suit. The settlement paid the Center substantial sums of U.S. taxpayer money. Outrageously, the Federal court had refused to allow us to intervene and, even more despicably, the Forest Service in the settlement agreed to withdraw important portions of our grazing allotment and take water rights we had under Arizona law.

Two years later in the 1999 Center lawsuit against the Forest Service regarding our other grazing allotment, that Federal judge allowed us and ten other affected ranchers to intervene. The carbon copy lawsuit filed by the Center demanded that the court enjoin grazing while the Forest Service consulted with the Fish and Wildlife Service regarding species that were not known to exist on our allotments. Once again, the Center had strategically availed itself of citizen suit provisions of the Endangered Species Act and to try to eliminate our grazing operations even though the named target was the Forest Service. Why does Congress allow the Endangered Species Act to have such grave impacts on citizens who are collateral damage when the Center, in their war against western ranching, sues the federal agencies? After spending about $400,000 on this lawsuit, the Chilton intervener group successfully argued its case and the Judge ultimately determined the Center's lawsuit was moot.

Agency Activists Abusing ESA Authority

During the late 1990's, we uncovered evidence that some employees of the Forest Service were working with the Center to carry out its anti-grazing agenda. Utilizing the Freedom of Information Act, we discovered that our official Forest Service files were being stuffed with inaccurate data. We immediately realized that we could only defend ourselves against the two-pronged assault from the Center and anti-grazing activists inside the Forest Service by obtaining current site-specific data using peer-reviewed repeatable procedures so science would overcome political science. As a consequence, we retained Jerry L. Holechek, Ph.D and Dee Galt, Ph.D. Dr. Jerry L. Holechek is the lead author of the primary textbook on range management used in universities and by professional range scientists. (**RANGE MANAGEMENT, PRINCIPLES & PRACTICES,** Fifth Edition, published by Prentice Hall) Dr. Dee Galt is a widely-published scholar of range science, hydrology, soils and riparian habitats.

In addition we retained two law firms, a fish biologist, an expert on lesser long-nosed bats, experts on National Environmental Protection Act procedures, and a soils and riparian Ph.D., Dr William Fleming, of the University of New Mexico. Our objective was to bring to the official Forest Service record unimpeachable scientific methods, systematic data collection, and verifiable documentation of the current condition of the range, riparian areas and soils on our forest allotments. Even though one high ranking Forest Service official tried to get professor Holechek to change a report he had written regarding our allotment, after 2000, other Forest Service professionals began to recognize the quality and reliability of the data being assembled and generally began to rise to the new standard.

However, it was during the late 1990's. Specifically, the Forest Service assigned a fish biologist, Jerry Stefferud, to draft a biological assessment for a Mexican minnow, the Sonora chub. Using speculation and political science, Mr. Stefferud concluded that cattle grazing on our 21,500-acre allotment would adversely affect the chub. At the same time, Forest Service officials assigned Mima Falk to draft a biological assessment for our allotment with respect to the lesser long-nosed bat. No evidence whatsoever documented the bat's presence on our ranch. Nonetheless, Ms. Falk asserted that the absent species would likely be adversely affected by cattle grazing even though Dr. Yar Petrysyn and Dr. Cockrum, famed experts on the lesser long-nosed bat, argued in a prestigious peer-reviewed scientific journal that the bat should never have been listed and that the responsible individuals at the Fish and Wildlife Service had relied on insufficient data, poor survey techniques and bad information in the listing process. Stunningly, Mr. Stefferud himself and Ms. Falk's husband have been supporters of the Center for Biological Diversity contributing $200 or more to the Center.

Once the adverse calls on the Sonora chub and the lesser-long nosed bat were made, the Endangered Species Act required the Forest Service to consult on the species with the Fish and Wildlife Service. At the Fish and Wildlife Service, Jerry Stefferud's wife, also a fish biologist, participated in writing the legally binding Biological Opinion. In agreement with her husband, she and her colleagues maintained that the Sonora chub would likely be adversely affected by cattle grazing. The Biological Opinion dictated how we would graze the allotment as a condition for giving both the Forest Service and ourselves the right to kill or injure the Sonora chub without being charged with a felony. We were required to have a five-person team evaluate the pastures into which we were scheduled to move our cattle two weeks prior to moving into each pasture, two weeks prior to moving out of each pasture and two weeks after we moved the cattle out of each pasture. This extremely burdensome and expensive requirement was ostensibly for the protection of a minnow which is abundant in Mexico where 99.7 % of all the fish in a 5,000 square mile three-river basin have been scientifically determined to be secure and abundant. More importantly, the Forest Service had already fenced off and removed from our allotment about 1/4th of a mile of the allotment along California Gulch where some Sonora chub swim under the international border fence. The authors of the Biological Opinion knew one more fact: that the terms and conditions were irrelevant to

the fish because every single one that swims under the international border fence into the temporary pools just north of the border dies when the wash dries up every year.

Victory for science and ranching communities in the Federal Courts

Thanks to the Arizona Cattle Growers' Association, after the Biological Opinion was issued, we filed a lawsuit in Federal District court arguing that the Fish and Wildlife Service had no right to issue an incidental take statement for the chub and the bat when there was no evidence that either was on the ranch. Justice prevailed when Federal Judge Broomfield ruled that the Biological Opinion was arbitrary, capricious and unlawful. Hence the Fish and Wildlife Service could not in the future give an incidental take statement with terms and conditions regulating grazing based on their assertion that an allotment could be suitable or potential habitat for a species not shown to be present.

In reaction to Judge Broomfield's 2000 decision, the Tucson office of the Forest Service decided to prepare another Biological Assessment again using Jerry Stefferud, a supporter of the Center for Biological Diversity, as its fish biologist. Once again, individuals in the Forest Service asserted that both the Sonora chub and the bat would be adversely affected by cattle grazing in spite of not being on the allotment and in spite of Judge Broomfield's decision. As a consequence, consultation with the Fish and Wildlife Service was again triggered giving the same activists another shot at us; consultation led to another an incidental take statement supposedly protecting us from felony charges if our cows somehow harmed a species not present on our ranch. As a condition of the incidental take statement, Sally Stefferud and her colleagues in the Fish and Wildlife Service demanded this time that over one square mile of our allotment be removed from cattle grazing to protect the chub. Fortunately, our lawyers, fish biologist and consultants proved that the canyon Sally Stefferud and her fellow activists said was a stream was a large dry wash most of every year. Thankfully, David Harlow, State Director of the Fish and Wildlife Service, when presented with a large collection of photographic evidence, realized that the Draft Biological Opinion was incorrect in calling the dry wash a stream. He corrected the Biological Opinion and adopted the Forest Service preferred alternative for grazing our allotment. Is that reversal reason to say, "See the system works?" No. We spent tens of thousands of dollars amassing the real data and the legal documents to counteract the taxpayer-funded fiction generated by the activists.

Adding insult to injury, the Fish and Wildlife Service and the Center for Biological Diversity appealed the Broomfield case to the Ninth Circuit Court of Appeals. Dramatically, a three-judge panel of the Ninth Circuit Court in 2001 unanimously agreed with Judge Broomfield that the first Biological Opinion was arbitrary, capricious and unlawful. In addition the Court ruled that the burden of proof as to whether a species was present on a grazing allotment was upon the Federal agencies and not the rancher. Most importantly, the Court stated that even if listed species were proven to be present on a grazing allotment, the Fish and Wildlife Service would need to articulate a rational connection between grazing and killing or injuring the species: a great victory based on logic and common sense; a devastating loss for the Center for Biological Diversity and the Fish and Wildlife Service. However, winning this case required another enormous

legal expense by Arizona ranchers who donated calves at auction to fight this activist onslaught.

Center for Biological Diversity Maliciously Attacks Chiltons

On June 5, 2001 Rob Klotz, an employee of the U.S. Park Service, and members of the Center for Biological Diversity worked together to draft a letter falsely accusing us of having three spots on our ranch that were overgrazed, that three agave stalks were broken by cattle and that we had let cattle into the Forest Service exclosure at the border that had been withdrawn from our allotment to insure against any direct temporary contact with the chub. All of these allegations were asserted to be evidence of illegal harm to the bat and the chub. The Center asked that our grazing permit, that we purchased from the previous holder of the grazing rights for $750,000, be immediately terminated as the remedy for the alleged actions. To the credit of the Forest Service, they immediately investigated and found all charges to be totally false.

Center for Biological Diversity uses NEPA to Assault Chiltons

During the National Environmental Policy Act process on one of our two grazing allotments, the Center for Biological Diversity appealed the Forest Service finding of no significant impact from continued well-managed grazing. Their appeal asked the Forest Service to complete a full environmental impact statement requiring years of preparation and to halt grazing until the EIS was completed. The Forest Service rejected their appeal and renewed the grazing permit for another ten years. Upon being informed of the rejection, the angry Center for Biological Diversity sent a news release to their media contacts and then published a "news advisory" and 21 accompanying photographs on their website. The text of the "news advisory" and the 21 photographs grossly misrepresented the condition of the allotment and reasserted the disproven charges that we mismanaged the allotment in violation of the Endangered Species Act. Our hometown newspaper published the vicious misrepresentations and referred readers to the Center's website to view the 21 photographs.

Chiltons Successfully Sue Center for Biological Diversity

After reading the aforementioned local newspaper article and then going to the advertised website, we asked our lawyers to send a demand letter asking the Center for Biological Diversity to remove the slanderous and defaming website "news advisory" and 21 accompanying photographs. The photographs were all maliciously misrepresentative: five were not on the allotment, one was the bottom of a dry lake; others depicted campsites and mined areas. All the photos implied that grazing was the reason for small bare spots shown in the photographs on the 21,500-acre forest allotment. When the Center ignored our request, we decided to file a lawsuit against the Center of Biological Diversity and three of its employees. On January 21, 2005 a jury found that the "news advisory" and 21 accompanying photographs were intentionally false, were purposely misrepresentative and were made by the Defendants with knowledge of their falsity or with reckless disregard for the truth and with an "evil mind." The jury awarded

us $100,000 in damages and voted to punish the Center for Biological Diversity by awarding us $500,000 punitive damages.

Abuses of the Endangered Species Act

It seemed not to matter that the two species used as surrogates by the Center for Biological Diversity were neither on the ranch, nor would have been in any way affected, by the actions complained of by the Center even if the claims had been true. Published research by reputable scientists has established that the bats have plenty of agave flowers where they actually do live and the chub flourishes on heavily grazed ranch lands in northern Mexico.

The Endangered Species Act, as presently constructed, has allowed hundreds of species to be listed by petition from activist organizations. Approximately 300 listings have been proposed by the Center. Evaluation of the activists' claims that resource uses are threatening the species' survival is up to the Fish and Wildlife Service employee who is entirely empowered to simply accept assertions as if they were science. The public does not read the Federal Register; the public has a life and a job and can not afford the time and expense to monitor the latest listing proposals, hire a scientist to evaluate the activists' claims and submit timely and well-documented responses to ensure that only genuinely needy species are listed and that recovery plans actually address their real threats. The Endangered Species Act, as presently constructed, allows the Fish and Wildlife Service to assure its own permanent job security by liberally listing species that the Service is then tasked with recovering at great cost to the taxpayers and to impacted citizens. For the Fish and Wildlife Service, larger budgets, extraordinary land use control, and expanded power are obtained with each new listing.

The law as presently constructed allows no real recourse to the citizen who becomes a victim of agency employees who, virtually single-handedly, can initiate a chain of events inexorably leading to the bankruptcy of the individual or to the termination of an entire industry. One Forest Service biologist, by making a "likely to adversely affect" call on one species triggers an obligatory Section 7 consultation process in which one more biologist with a "zero cut" or "zero grazing" personal agenda can complete the circle essentially setting terms and conditions for historic multiple uses that make harvest impossible. Additionally, two more opportunities to end multiple use are created as soon as a listed species is claimed to be affected: first, as in our case, activists outside the agencies can seek an injunction against the targeted use during the lengthy period (usually several years) before consultation can be completed or a plan can be written to manage the Forest for the named species. Few, if any, small private businesses like ranches or timber mills can hold out for years with no production while the wheels of agency compliance slowly turn out the required documents. Second, the final plan can be so onerous that production can never be resumed.

The average private citizen has no timely recourse against the well-placed activists inside the agencies. Presently, even a history of excellent stewardship is of almost no

avail in the face of the determined assaults of activists inside and outside of the federal land management agencies.

Fundamental Observations

The Center for Biological Diversity and other non-governmental organizations assert that an "extinction crisis" exists. This claim is used as justification for eliminating a citizen's right to the reasonable use and enjoyment of private property.

Several problems exist with this thesis. First an extinction "crisis" is not proven. It is the product of hysterical extrapolation trumpeted by groups whose income is directly dependent on creating a crisis mentality.

Second, the consequences of an extraordinary level of extinction are unverified. The Center and environmental movement argue a necessity to protect the "web of life" by removing the "human footprint" from over 50% of the American landscape following a program of "restoration." It assumes a static system and denies the millennia of evidence that life is dynamic with adaptability being the rule of survival and with new species arising whenever a niche is opened. A better argument holds that a healthy landscape is one managed through science and disturbance via a reasoned process of adaptive management. Restoration is illusionary; the past cannot be recreated and the present can not be made static.

Third, the real effect of the Endangered Species Act as presently construed is consolidation of America's rural lands and natural resources into the hands of government and non-governmental organizations. This public/private partnership impedes free enterprise and threatens one of history's greatest achievements- the American experience.

The law ought to focus on motivating recovery of species of concern, premised on the reasoned Judeo-Christian notion of a ranking of importance of the various species, with man (individually and collectively) acknowledged as supremely important. Accordingly, intentional killings and the economic trading of bald eagles could be outlawed; the development of a hospital in the fly space of an insect would not be a matter for legal intervention. Such a premise would resonate with ordinary people because that is how truth and reason work. However, the Endangered Species Act is presently being employed to actively debase the Judeo-Christian respect for man and supplant it with a different religious viewpoint.

Private property is not utopian. It is simply the best arrangement for motivating human ingenuity to improve landscapes. This is for reasons of knowledge and innovation. A free people, vested with the security of private property and the rule of moral law, have natural incentives to conserve soil resources, manage fuel loads, provide market product and increase natural diversity, productivity, aesthetics and recreational opportunities.

Conclusion

Clearly, the Endangered Species Act has been co-opted by the Center for Biological Diversity and by a few sympathizers in positions of power in federal agencies. A small number of individuals found it safe and easy to use existing provisions of the law to conduct a ruthless attack intended to eliminate our grazing permit and ranching operations. The good news is that the Forest Service, the Fish and Wildlife Service and the jury ultimately recognized truth in spite of the abusive misapplication of the Endangered Species Act. We sincerely appreciate those ethical and professional employees of the Forest Service and Fish and Wildlife Service who have corrected injustices.

What we learned is that the Endangered Species Act does not recover species. Instead, it drives federal agencies and their non-governmental specters toward an insidious acceptance of the elimination of a citizen's use and enjoyment of private property. This covert drive has caused a degradation of the American landscape and a concentration of wealth within government and its partnering organizations. Environmental law needs to be improved so that honest hard working citizens are not victimized by the Act, but are free to work toward the actual recovery of species that are in fact threatened or endangered. A new focus would lead to recovery rather than to a continuation of a failed listing process. An improving natural world order occurs because of freedom, not in the absence of freedom. And as George Washington said, "private property and freedom are inseparable." Thank you very much.

Respectfully yours,

Jim Chilton